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Supreme Court, U.S.
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In the
Supreme Court of the United States

JEFFREY S. MARX,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

JOHN CORNYN
Attorney General of Texas

ANDY TAYLOR
First Assistant Atty General

SHANE PHELPS
Deputy Attorney General

GREGORY S. COLEMAN
Solicitor General

ROSS RAYBURN
Assistant Attorney General
Acting Chief, Habeas Corpus Div.

CHARLES A. PALMER
Assistant Attorney General
Counsel of Record

Office of the Attorney General
P.O. Box 12548 (MC 066)
Austin, Texas 78711-2548
(512) 936-1400

ATTORNEYS FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether application of TEX. CODE CRIM. PROC. ANN. art. 38.071 to Marx's trial violated his rights under the Confrontation Clause because the evidence failed to show that use of the closed-circuit television was necessary to protect the non-victim child witness from further emotional trauma.

2. Whether TEX. CODE CRIM. PROC. ANN. art. 38.071 is facially unconstitutional because the use of closed-circuit testimony violated Marx's right to be presumed innocent.

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No. 98-9183

In the

Supreme Court of the United States

JEFFREY S. MARX,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the State of Texas, submits this brief in opposition to Jeffrey S. Marx's petition for writ of certiorari. In his petition, Marx asks the Court to review the decision of the Texas Court of Criminal Appeals, affirming his conviction for aggravated sexual assault. *Marx v. State*, 987 S.W.2d 577 (Tex. Crim. App. 1999). Specifically, Marx attacks the lower court's holding allowing a non-victim child witness to testify through a closed-circuit television and concluding that the use of closed-circuit testimony does not violate his presumption of innocence.

Marx contends that it was constitutional error to allow the testimony of a non-victim child witness via closed-circuit television because the procedure was necessary to protect the non-victim child witness from further trauma. *See* Pet. at 7-10. Concerning the alleged violation, the Texas Court of Criminal Appeals employed precisely the same legal standard that this Court established in *Maryland v. Craig*, 497 U.S. 836 (1990). *Marx*, 987 S.W.2d

at 580. The Court should deny Marx's petition because the court of criminal appeals's decision does not conflict with relevant decisions of this Court or decisions of the United States courts of appeals. *See* SUP. CT. R. 10(b), (c).

Furthermore, Marx's argument that the evidence failed to support the trial court's decision to allow the non-victim child witness to testify via closed-circuit television is fact bound. This argument necessarily requires a review of the evidence supporting the trial court's decision. The Court should decline Marx's invitation to review the evidence and discuss specific facts. *United States v. Johnston* 268 U.S. 220, 227 (1925); *Southern Power Co. v. North Carolina Pub. Serv. Co.*, 263 U.S. 508, 509 (1924). Marx's reliance on *Danner v. Kentucky*, 119 S.Ct. 529 (1998), is unavailing. Pet. at 8-10. The denial of certiorari in *Danner* simply demonstrates that the Court does not review cases that are fact bound. The purely factual nature of Marx's argument strongly suggests that the petition for writ of certiorari should be denied.

If the admission of the non-victim's testimony via closed-circuit television resulted in a constitutional violation, it was harmless error beyond a reasonable doubt.

Judicial restraint requires the Court to avoid unnecessary resolution of constitutional issues. *Ashwander v. TWA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring). The Court has consistently adhered to the principle that it will not address a constitutional question unless it is necessary to the resolution of the case before the court. *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974). Marx's argument that article 38.071 was used to allow the testimony of the child witness is false because the court of criminal appeals

expressly found that the use of closed-circuit television was allowed by precedent other than article 38.071. *Marx*, 987 S.W.2d at 583. Logically, if article 38.071 did not serve as the basis for allowing the testimony, then Marx's attack on the constitutionality of the statute does not affect the validity of his conviction. The Court has long recognized that it has no power to render advisory opinions. *Ashwander*, 297 U.S. at 346-47. Because article 38.071 was not the basis for allowing the child witness's testimony, the Court's resolution of the issues would be advisory, thus certiorari should be denied.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Marx was charged with three counts of aggravated sexual assault of a child. Tr 1.[1] He pleaded "not guilty" and was tried by a jury, which on April 24, 1995, found him guilty of Count I and not guilty of Counts 2 and 3. Tr 114-16. Following a separate punishment hearing, the jury assessed punishment of imprisonment for twenty-three years. Tr 121.

Marx's conviction was affirmed by the Third Court of Appeals of Texas on July 3, 1997. *Marx v. State*, 953 S.W.2d 321 (Tex. App.—Austin 1997, pet. granted). Thereafter, the Court of Criminal Appeals granted Marx's petition for discretionary review and affirmed the judgment of the court of appeals. *Marx v. State*, 987 S.W.2d 577 (Tex. Crim. App. 1999).

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[1] "Tr" refers to the transcript of papers filed with the court prior to and during Marx's trial, followed by page number. "SR" refers to the state record of transcribed trial proceedings, preceded by volume number and followed by page number.

B. Statement of Facts

The relevant facts are set out in the opinion of the court below:

> In August 1994, a Burnet County grand jury indicted [Marx] on three counts of aggravated sexual assault of a child. *See* TEX. PENAL CODE ANN. §22.021(a)(1)(B)(i) & (2)(B). The named victim in each count was a thirteen-year-old girl, B. J. In April 1995, shortly before the case went to trial in the 33rd District Court of Burnet County, the State filed written motions in that court asking that B. J. and another girl, six-year-old J. M., an alleged witness to the offenses, be allowed to testify via two-way closed circuit television, outside [Marx's] presence. The State argued in the motions that the two girls, "if forced to testify in the presence and sight of the defendant, would suffer serious emotional and physical distress." The State argued further that the girls' closed circuit television testimony would be admissible under the Sixth Amendment, as interpreted in *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L. Ed.2d 666 (1990), and Article 38.071.[2]
>
> The District Court held a pretrial hearing on the State's motions, at which hearing four witnesses testified. Pat Fluitt, B. J.'s teacher at Burnet Middle School, testified that B. J. had "learning disabilities" and read at a six-year-old's level. She testified further that B. J. had been "dreading" the possibility of testifying in [Marx's] presence and had "cried a couple of times" about it in class. Fluitt also testified that B. J. was "quite fearful" and that requiring her to testify in [Marx's] presence "would be a traumatic situation" for her.
>
> Barney Raines, B. J.'s grandfather, testified that B. J. was "sixty percent" mentally retarded. He also testified that she had "shown fear" and had told him that [Marx] had threatened her. Raines testified further that he believed B. J. would suffer emotionally and perhaps physically if required to testify in [Marx's] presence.
>
> Crystal Hayden, J. M.'s mother, testified that J. M. was afraid of [Marx] but was nevertheless ready to testify in his presence. Hayden also

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[2] Article 38.071 provides that, in certain specified circumstances, a child witness' testimony may be taken via videotape or closed circuit television, outside the defendant's presence. *See generally* 3 F. Maloney (ed.), *et al.*, TEXAS CRIMINAL PRACTICE GUIDE §73B.02[5][d] (1997).

testified, however, that J. M. was "real scared" and that she would probably be traumatized if required to testify in [Marx's] presence, even if her testimony related only to what [Marx] had done to B. J..

Finally, Dr. Anita Calvert, a licensed mental health therapist, testified that she had been counseling J. M. for an extended period of time because of [Marx's] many sexual assaults on her. Calvert testified further that J. M. was a "wreck," that she had had nightmares, and that she had suffered serious psychological damage, all because of what [Marx] had done to her. Calvert also testified that J. M. had demonstrated "extreme sexual knowledge" and had "inappropriately advanced males in [Calvert's] office," again because of what [Marx] had done to her. Finally, Calvert testified that, although J. M. was "a very strong little girl" and "would probably testify okay" in [Marx's] presence, she could not be certain of that.

[Marx] objected to the used of closed circuit television testimony on both constitutional and statutory grounds. He argued first that use of such testimony would deny him his Sixth Amendment right to confront the witnesses against him. He argued second that the use of such testimony would violate Article 38.071 "because [that statute] applies only to a victim of the offense for which the defendant is on trial, and the victim of that offense [must be] under [thirteen] years of age." [Marx] pointed out that B. J. was thirteen years old that and that J. M. was not the alleged victim of the offense for which he was being tried.

At the conclusion of the hearing, the District Court found, as a matter of fact, that both B. J. and J. M. "would be traumatized by being required to testify in the defendant's presence" and that "the emotional distress . . . would be more than a minimum." The court then rejected [Marx's] legal arguments without explanation and granted the State's motions for closed circuit testimony.

Shortly before B. J. and J. M. testified at the guilt/innocence stage of trial, [Marx] reiterated his previous objections to the use of closed circuit testimony and also argued, for the first time, that use of such testimony would impair his Fourteenth Amendment right to the presumption of innocence "because for a child to be presumed to be harmed [by testifying in his presence], then [one must] presume that this offense did, in fact, occur." The District Court rejected all of [Marx's] arguments, however, and, shortly thereafter, instructed the jury as follows:

> Ladies and gentlemen, I'm going to give you an instruction at this time. Our statutes provide that the testimony of children in these types of cases can be taken by what we call closed circuit television, and that is what's going to be taking place here for the next couple of witnesses. So we'll be seeing the witness on the closed circuit television, and [the attorneys] will be asking the witness questions from the podium there so that [the witness] can see the person who is asking the questions, and so forth. The rest of the procedure will go according to the Code of Criminal Procedure as we are bound by it, at any rate, and that will be the only change insofar as the testimony is concerned.
>
> B. J. and J. M. then testified via two-way closed circuit television. The jury convicted [Marx] of one count of aggravated sexual assault and assessed his punishment at imprisonment for 23 years.

Marx, 987 S.W.2d at 578-80.

ARGUMENT

I. THE QUESTIONS PRESENTED ARE NOT IN CONFLICT WITH ANY OTHER DECISION AND DO NOT PRESENT AN IMPORTANT QUESTION THAT SHOULD BE DECIDED BY THE COURT.

Rule 10 provides for discretionary review when a decision of the state's highest court is in conflict with decisions of other states' highest courts or a United States court of appeals. As aptly stated by the state court of appeals, the issue presented, whether the testimony of a non-victim child witness by closed circuit television violates the Confrontation Clause, is an issue of first impression. *Marx*, 953 S.W.2d at 321. There are no decisions of another state's highest court or a United States court of appeals addressing the issue. Indeed, Marx does not argue that there is a conflict but rather that the Court should review this case to re-define its holding in *Maryland v. Craig*. Pet. at 8 ("This writ should be granted in order for

the Supreme Court to reexamine its holding in *Maryland v. Craig*, and for the Supreme Court to examine how far they are going to allow that holding to be expanded."). Because Marx does not even allege a split of authority, the petition should be denied.

The Court has held that the Confrontation Clause "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988). The right is not absolute, however, and must accommodate the state's "compelling" interest in "the protection of minor victims of sex crimes from further trauma and embarrassment." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). Accordingly, in *Maryland v. Craig*, the Court found "where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure [which] preserves the essence of effective confrontation." 497 U.S. at 857.

The *Craig* Court addressed whether the Confrontation Clause was violated by allowing a child witness in a child abuse case to testify at trial outside of the defendant's presence through the use of one-way closed circuit television. The Court held that "the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant." *Id.* at 855.

In addition to *Craig*, other courts have regularly recognized the need to protect the physical and psychological well-being of child abuse victims in judicial proceedings, and a variety of measures have been used to alleviate the harsh consequences associated with child abuse cases. *See, e.g.*, *United States v. Carrier*, 9 F.3d 867, 869 (CA10 1993) (child testified over two-way closed circuit television in the presence of the attorneys), *cert. denied sub nom. Carrier v. United States*, 511 U.S. 1044 (1994); *United States v. Garcia*, 7 F.3d 885, 887 (CA9 1993) (child testified over two-way closed circuit television outside the presence of the defendant); *Thomas v. Gunter*, 962 F.2d 1477, 1480 (CA10 1992) (child videotaped at treatment center in the presence of her therapist and an investigator selected by the defendant); *Spigarolo v. Meachum*, 934 F.2d 19, 21 (CA2 1991) (child videotaped in the presence of the attorneys and judge); *Arcaris v. Superior Court*, 774 P.2d 837, 839 (Ariz. Ct. App. 1989) (mother allowed to be present during child's deposition); *Otteson v. District Court*, 443 N.W.2d 726, 727 (Iowa Ct. App. 1989) (defendant separated from child by one-way mirror).

Also following the factors established in *Maryland v. Craig*, a few courts have addressed whether closed-circuit television testimony of child witnesses who were not victims of sexual abuse violates Confrontation Clause principles. In *State v. Ford*, 626 So.2d 1338, 1345 (Fla. 1993), the Florida Supreme Court considered whether the videotaped testimony of a child witness was allowed in a murder prosecution. *Id.* 1344-45. Although the specific facts in the case before the court constituted error, the Florida Supreme Court noted that a court's "inherent powers to do all things that are reasonable and necessary for

the administration of justice" included protecting witnesses; thus, the trial court could properly allow the testimony of child witnesses using this procedure. *Id.* The Florida Court found that the factors in *Maryland v. Craig* must be satisfied to avoid offending the Confrontation Clause. *Id.*

Similarly, the Texas Court of Criminal Appeals found that the testimony of a child witness by closed circuit television in a murder prosecution did not violate the Confrontation Clause. *Gonzales v. State*, 818 S.W.2d 756, 766 (Tex. Crim. App. 1991). The Texas Court of Criminal Appeals specifically noted that *Craig* did not foreclose the testimony of a child witness who was not the victim. 818 S.W.2d at 764-66 (concluding that allowing a child to testify by closed-circuit television, even without express statutory authorization, did not violate defendant's Sixth Amendment right).

Whether a non-victim child witness may testify through a closed-circuit television is not a question left open by the Court's decision in *Maryland v. Craig*, but even if it was, there is no conflict in the decisions of the courts. Because the issue is not immediate and compelling, the Court can postpone consideration of the question until it is squarely presented and there is disagreement among the lower courts. In Marx's case, it is important to note that the non-victim child witness was herself allegedly a victim of sexual abuse by Marx. *Marx*, 987 S.W.2d at 584 (Holland, J., concurring and dissenting) ("the State established that J.M., [the non-victim witness], had suffered emotional harm due to prior sexual offenses allegedly comitted by [Marx] and was frightened by him"). Although the non-victim witness was not the named complainant in the indictment for which Marx was

on trial, she in fact was alleged to be his "victim" in another indictment that had not yet proceeded to trial. For these reasons, this is not the appropriate case for the Court to decide whether the rule of *Maryland v. Craig* should extend to non-victim witnesses.

Further, the issues in this case involve only the application of established constitutional principles to the facts. Thus, the petition presents no important question of law to justify this Court's exercise of its certiorari jurisdiction. Accordingly, because there is no conflict between the court below's decision and the relevant decisions of this Court concerning whether a Confrontation Clause violation occurred as an initial matter, *See* SUP. CT. R. 10(c), Marx's petition should be denied.

II. THE PETITION SHOULD BE DENIED BECAUSE THE COURT DOES NOT GRANT CERTIORARI TO REVIEW THE STATE COURTS' FACTUAL FINDINGS.

Marx asks the Court to review the record evidence and find that allowing the non-victim child witness's testimony via closed-circuit television violated his constitutional rights. Pet. at 7-8. Even if Marx's petition is found to encompass issues broader than the constitutionality of the statute, review nonetheless is not warranted because no important question of law is presented. There can be no doubt that the court below applied the correct standard of *Maryland v. Craig*, 497 U.S. 836 (1990), in deciding the constitutional issues before it, and the only real point of contention is the adequacy of the state trial court's fact findings that the child witnesses would be traumatized if forced to testify in Marx's presence. Five judges found that the requirements of *Maryland v. Craig* were satisfied with regard to both child witnesses who testified via closed circuit television, while four found that only

one of the two witnesses was so traumatized as to justify use of the procedure. Marx does not, because he cannot, argue that the Texas court applied the wrong constitutional standard,[3] and instead merely asks this Court to reevaluate whether the record supports the trial court's findings.

This is precisely the sort of factual inquiry that the Court traditionally has found insufficient to justify exercise of its certiorari jurisdiction. *See, e.g., Johnston,* 268 U.S. at 227 ("We do not grant certiorari to review evidence and discuss specific facts."). This is particularly so in the instant case, where the state trial court's findings have received the imprimatur of both the state court of appeals and the Court of Criminal Appeals, because this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949); *see also Goodman v. Lukens Steel Co.*, 482 U.S. 556, 565 (1987) ("both courts having agreed on the facts, we are not inclined to examine the record for ourselves absent some extraordinary reasons for undertaking this task"). As discussed in section III, *infra,* any constitutional violation in the use of closed-circuit television at Marx's trial was harmless error beyond a reasonable doubt. This case does not present an extraordinary error, and therefore, review of the state courts' fact findings is unwarranted.

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[3] Marx does argue that the rule of *Maryland v. Craig* should not extend to non-victim witnesses. Although he correctly asserts that this specific issue has not been decided, this is not the appropriate case in which to do so. *See* discussion part I, *supra.*

Moreover, the difficulties inherent in making factual determinations from a cold record caution against such an undertaking. Neither this Court nor the court below is as well situated as the trial court to judge whether the witness's emotional state justified the use of closed circuit television at Marx's trial.

> Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses.

Marshall v. Lonberger, 459 U.S. 422, 434 (1983).

Since *Maryland v. Craig* was decided, the federal courts of appeals have had numerous opportunities to decide whether its teachings (and partial codification in 18 U.S.C. §3509(b)(1)(B)) were correctly applied to a particular factual situation and have reached different conclusions based on the records before them.[4] There is nothing remarkable about this case that renders it any more worthy of review. Reevaluation of the adequacy of the state courts' findings at Marx's trial is warranted only if this Court is prepared to function as an error-correction court, which it manifestly is not. *See, e.g., Calderon v. Thompson*, 118

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[4] *E.g., United States v. Moses*, 137 F.3d 894, 898-99 (CA6 1998) (district court clearly erred in finding that child witness would be traumatized if forced to testify in defendant's presence when she repeatedly stated that she was not afraid of him); *Fields v. Murray*, 49 F.3d 1024, 1036 (CA4) (en banc) (upholding refusal to allow defendant to proceed *pro se* at trial and cross-examine child witnesses in sex abuse case), *cert. denied sub nom. Fields v. Angelone*, 516 U.S. 884 (1995); *United States v. Carrier*, 9 F.3d at 870-71 (upholding use of closed circuit television where record supported trial court's findings that child witnesses would suffer trauma from testifying in defendant's presence); *Hoversten v. State of Iowa*, 998 F.2d 614, 616 (CA8 1993) (use of one-way mirror not justified where district court found only that child would be traumatized by testifying in courtroom generally rather than in defendant's presence).

S.Ct. 1489, 1507 (1998) (Souter, J., dissenting) ("It is . . . axiomatic that this Court cannot devote itself to error correction . . . .").

III. THE COURT SHOULD NOT GRANT CERTIORARI TO REVIEW ALLEGED ERROR THAT WAS HARMLESS BEYOND A REASONABLE DOUBT.

Because the Court of Criminal Appeals upheld the procedure employed by the trial court, it did not reach the issue of harmless error. If there was error of constitutional dimension, however, it surely was harmless in light of the entire record of Marx's trial.

Whether Confrontation Clause error in a particular case may properly be deemed harmless beyond a reasonable doubt depends on "a host of factors," including

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).

Of the three judges who decided Marx's appeal in the state court of appeals, one believed that the Confrontation Clause was violated but that any error was harmless beyond a reasonable doubt. *Marx*, 953 S.W.2d at 341 (Kidd, J., concurring).

> Evidence against [Marx] consisted of his voluntary confession, the testimony of the complainant, and testimony of other corroborative witnesses including the six-year-old child witness in question. In his confession, [Marx] voluntarily admits engaging in sexual intercourse with the complainant which forms the basis for the jury's verdict of guilt. A review of the child witness's testimony reveals that she testified to having observed, through the window, [Marx] and the complainant engaging in sex. The child's testimony, though brief, is filled with contradictions and overly detailed descriptions of other persons present who were either unavailable to the prosecution or would not verify the child's story.

> In sum, it is open to question whether the testimony of the child witness helped or hurt the prosecution. At best, it provided minimal corroboration of criminal conduct to which [Marx] had already confessed. At worst, it provided the defense with considerable ammunition to challenge the prosecution's case. Therefore, I conclude that, although the trial court erred in permitting the nonvictim witnesses to testify by closed-circuit television, it played no part in [Marx's] conviction.

Id. at 341-42.

This conclusion is unassailably correct. In addition to the factors cited by Judge Kidd, it should be noted that Marx did not testify or offer any evidence of alibi or any other reason to believe that he did not commit the acts to which he had confessed. Three witnesses testified on Marx's behalf at the guilt-innocence phase of trial: his brother, Winfred Wayne ("Wayne") Marx,[5] 4SR 538 *et seq.*; his mother, Connie Marx, 4 SR 571 *et seq.*; and Wayne's former girlfriend, Louise Bonnett. 4 SR 576 *et seq.* Wayne Marx had been present at the outing at which the offense occurred, but had no personal knowledge of facts that were sufficient to rebut the testimony of the state's witnesses. Instead, he testified that "I don't believe it happened. There's no way it could have." 4 SR 560. Connie Marx admitted that she had not been present and had no knowledge of what took place other than what Marx had told her. 4 SR 574. Although Bonnett had been present, her testimony, like that of Wayne Marx, was limited to what she had observed and, even if believed,[6] was insufficient to

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[5] Wayne Marx is the father of J. M. 4 SR 538.

[6] Bonnett's testimony was anything but believable. Although she did not remember the date on which the events in question occurred, 4 SR 577, she did remember that she had been wearing a pink blouse and jeans and that Wayne Marx had been wearing a blue shirt and jeans. 4 SR 582. Yet, she didn't recall what items of clothing Wayne wore the following weekend. *Id.*

exculpate Marx.

In sum, the prosecution's case was overwhelming. J. M.'s testimony was relatively unimportant and was corroborated by the testimony of other witnesses and by Marx's confession, "probably the most probative and damaging evidence that can be admitted against him." *Bruton v. United States*, 391 U.S. 123, 139 (1968) (White, J., dissenting). On this record, any confrontation violation surely was harmless. *Cf. Olden v. Kentucky*, 488 U.S. 227, 233 (1988) (error not harmless where witness's testimony was "crucial" to the state's case, was directly contradicted by testimony of other witnesses and only slightly corroborated, and the state's case against the defendant "was far from overwhelming"). This Court should not expend its resources to correct an alleged error that had no effect on the lower court's judgment.

IV. THE PETITION SHOULD BE DENIED BECAUSE THE COURT DOES NOT GRANT CERTIORARI TO ISSUE ADVISORY OPINIONS.

Marx's petition presents nothing for review by this Court because, regardless how the questions presented are decided, they cannot affect the judgment of the court below. The Court of Criminal Appeals granted review to decide whether the state court of appeals had correctly decided "the constitutional and statutory arguments discussed previously." *Marx*, 987 S.W.2d at 580. Those arguments were that the use of closed-circuit television testimony at his trial (1) violated the Confrontation Clause of the Sixth Amendment, (2) violated Article 38.071 of the Texas Code of Criminal Procedure, and (3) impaired his Fourteenth Amendment presumption of innocence. *Id.* at 579. The Court of Criminal Appeals held that

the use of closed-circuit television testimony in Marx's case was constitutionally permissible even though not authorized by article 38.071. *Marx*, 987 S.W.2d at 582-83. Because the testimony was admissible as a matter of federal constitutional law, the court reasoned, it could not be excluded pursuant to the more stringent requirements of the statute: "We hold, therefore, that Article 38.071did not prohibit the admission of the closed circuit television testimony of B. J. and J. M." *Id.* at 583.[7]

Now, in this Court, Marx reurges two of the questions that were presented to the court below: (1) whether article 38.071, as applied at his trial, violated the Confrontation Clause, and (2) whether article 38.071 is facially unconstitutional in denying him the presumption of innocence. Pet. at i. Inasmuch as the Texas Court of Criminal Appeals specifically disavowed reliance on Article 38.071 in upholding the use of closed-circuit television at Marx's trial, the constitutionality of the statute is not at issue, and the questions presented in Marx's petition are a *non sequitur*. In other words, regardless whether article 38.071 is found to be constitutional, the judgment of the court below will not be affected, because it did not rely on the statute.

The Court should not expend its resources to issue an advisory opinion, which has been "disapproved by this Court from the beginning." *Steel Co. v. Citizens for a Better*

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[7] *See also id.* (Holland, J., concurring and dissenting) ("I agree with the majority that Article 38.071 of the Code of Criminal Procedure is not the exclusive authority permitting the use of closed-circuit television for the testimony of a child in Texas"); *id.* at 586 (Keller, J., dissenting) ("I agree with the majority's assessment that Article 38.071 does not preclude the procedure employed in the present case").

Environment, 118 S.Ct. 1003, 1016 (1998) (citing *Muskrat v. United States*, 219 U.S. 346, 362 (1911) and *Hayburn's Case*, 2 Dall. 409 (1792)). This is especially so where, as here, the opinion is "with regard to a constitutional question, as to which we seek to avoid even non advisory opinions." *City of Chicago v. Morales*, 119 S.Ct. 1849, 1869 (1999) (Breyer, J., concurring in part and concurring in the judgment) (citing *Ashwander*, 297 U.S. at 347).

V. THE PETITION SHOULD BE DENIED BECAUSE THE USE OF CLOSED CIRCUIT TELEVISION DID NOT IMPAIR MARX'S PRESUMPTION OF INNOCENCE.

Finally, Marx argues that the use of closed circuit television at his trial impaired his presumption of innocence by suggesting that the child witnesses were afraid of him because he in fact was guilty of the offenses with which he was charged. Pet. at 10-12. Because the court below's resolution of this issue was fully consistent with this Court's precedents, further review is unwarranted.

Whether a particular practice works to impair a defendant's constitutional presumption of innocence must be determined by whether "an unacceptable risk is presented of impermissible factors coming into play." *Estelle v. Williams*, 425 U.S. 501, 505 (1976). "[I]f the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over." *Holbrook v. Flynn*, 475 U.S. 560, 572 (1986). The Court of Criminal Appeals correctly applied this standard, noting that where "the challenged practice need not be interpreted by jurors as a sign that the defendant is particularly dangerous or culpable, it is not inherently prejudicial and does not deny due process." *Marx*, 987 S.W.2d at 581. The court found that no stigma attached to Marx

personally because the trial court instructed the jury that "the closed circuit television procedure about to be employed was authorized by statue 'in these types of cases.'" *Id.* In addition, the trial court instructed the jury on the presumption of innocence to be applied to Marx. Tr. 111.

Juries are strongly presumed to follow their instructions. *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). When this venerable presumption is applied to the cautionary instruction that Marx's jury received, there is no reasonable basis to believe that the jury drew an impermissible inference from the use of closed-circuit television at his trial. Marx fails to show actual prejudice, and his self-serving speculation that the presumption of innocence was impaired is not an adequate ground for review.

CONCLUSION

For the reasons stated, Respondent respectfully requests that Marx's petition for writ of certiorari be denied.

Respectfully submitted,

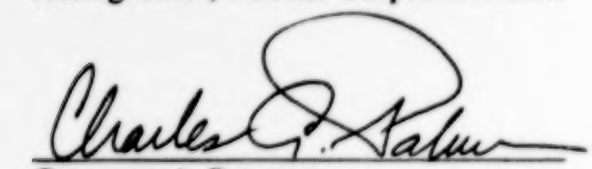
JOHN CORNYN
Attorney General of Texas

ANDY TAYLOR
First Assistant Attorney General

SHANE PHELPS
Deputy Attorney General for Criminal Justice

GREGORY S. COLEMAN
Solicitor General

ROSS RAYBURN
Assistant Attorney General
Acting Chief, Habeas Corpus Division



CHARLES A. PALMER
Assistant Attorney General
Counsel of Record

Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1400

ATTORNEYS FOR RESPONDENT

OFFICE OF THE ATTORNEY GENERAL OF TEXAS
JOHN CORNYN

August 4, 1999

Honorable William K. Suter, Clerk
United States Supreme Court
Office of the Clerk
1 First St., N.E.
Washington, D.C. 20543

Re: *Jeffrey S. Marx v. The State of Texas*
No. 98-9183

Dear Mr. Suter:

Enclosed for filing with the papers in the above styled cause are the original and nine (9) copies of Respondent's Brief in Opposition. Also enclosed is the Proof of Service form. Please indicate the date of filing on the enclosed copy of this letter and return it to me in the enclosed postpaid addressed envelope.

By copy of this letter, I am forwarding a copy of this brief to Petitioner's counsel.

Thank you for your kind assistance in this matter.

Yours truly,

CHARLES A. PALMER
Assistant Attorney General
(512) 936-1400

CAP:cc
Enclosure
c: F.N. "Trey" Brown, III
Law Office of Mock & Brown
205 South Pierce
Burnet, Texas 78611

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SUPREME COURT, U.S.

No. 98-9183

In the
Supreme Court of the United States

JEFFREY S. MARX,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Texas Court of Criminal Appeals

PROOF OF SERVICE

I hereby certify that on the 4th day of August, 1999, two copies of Respondent's Brief in Opposition was mailed, postage prepaid, to F.N. "Trey" Brown, III, Law Office of Mock & Brown, 205 South Pierce, Burnet, Texas 78611. All parties required to be served have been served. I am a member of the Bar of this Court.

CHARLES A. PALMER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

ATTORNEY FOR RESPONDENT

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